Supreme Court, U.S.
FILED

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No. 20-

IN THE

Supreme Court of the United States

SAMUEL ARTHUR SILVERMAN,
Petitioner,

vs.

STATE OF OREGON,
Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oregon

PETITION FOR A WRIT OF CERTIORARI

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38pp

QUESTION PRESENTED FOR REVIEW

Should the trial court decide, based upon the judge's examination of the evidence, evaluation of demeanor and knowledge of the facts and circumstances what is a proportional sentence for a criminal offense?

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No. 20-

IN THE

Supreme Court of the United States

SAMUEL ARTHUR SILVERMAN,

Petitioner,

vs.

STATE OF OREGON,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oregon

PETITION FOR CERTIORARI

Petitioner, Samuel Arthur Silverman, respectfully requests that this Court issue a writ of certiorari to review the Oregon Supreme Court's Judgment and the Opinion of the Court of Appeals in the above-entitled case.

OPINION BELOW

The opinion of the Oregon Court of Appeals is reported at *State v. Silverman*, 159 Or App 524, 977 P.2d 1186 (1999) (App-4). The Oregon Supreme Court denied Mr. Silverman's petition for review. (App-3). The judgment was issued after the Oregon Supreme Court denied Mr. Silverman's petition for reconsideration of denial of his petition for review (App-1).

JURISDICTION

Mr. Silverman filed for reconsideration in the Oregon Supreme Court on December 21, 1999 after the Court denied his petition for review. The appellate judgment was issued on February 15, 2000 (with denial of reconsideration). This petition is filed within 90 days of the date of the Oregon Supreme Court's denial the petition for reconsideration. Supreme Court Rule 13.1

This case presents a substantial question of federal law concerning proportionality in sentencing and the trial court's traditional role in determining a sentence. The issue was presented to the trial court at sentencing and was raised with both appellate courts. The Oregon court's ruling on the question cannot be sustained on independent state law grounds. Thus, this Court has jurisdiction to review the state court's decision in this case. 28 U.S.C. § 1257 (a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are Amendments VIII and XIV to the United States Constitution and Article 1, section 16 to the Oregon Constitution (App-17). The statutory provision involved, Or. Rev. Stat. 137.700 is also known from its initiative title "Ballot Measure 11" or "Measure 11" (App-18).

STATEMENT OF THE CASE

Mr. Silverman was convicted after guilty pleas to the offenses of sexual abuse in the first degree involving two thirteen (13) year old males. Before sentencing Mr. Silverman objected to imposition of the 75 month mandatory minimum sentences authorized by "Measure 11" (codified as Or. Rev. Stat. § 137.700).

After the court heard witness testimony, victims' statements and a statement of defendant during an approximately two hour sentencing hearing (as well as

reviewing a presentence investigation report and other documentation) the court made findings and ruled imposition of the mandatory minimum sentences required by Or. Rev. Stat. § 137.700 would be violative of constitutional provisions against disproportionate sentences. The court sentenced the defendant to a sentence prescribed by the state sentencing guidelines.[1] The defendant was incarcerated in the county jail for a term of 120 days as a condition of the ten (10) years probation imposed.

The trial court made two basic findings[2] in support of its ruling on proportionality:

(1) Mr. Silverman suffered from mental disorders that were directly material to his conduct; and

(2) no treatment for sexual disorders exists in the Oregon corrections system and that, since protection of the public is of foremost importance, the same could only be accomplished by means other than untreated incarceration.

The state appealed the trial court's decision.

On appeal the Oregon Court of Appeals chose to make its own findings of fact. These findings were selected from the range of possibilities available in the record. The appellate court then characterized its own findings as inconsistent with the trial court's determination that the mandatory minimum sentence was not proportionate to the offense, i.e., that the same would shock the conscience of all reasonable persons, or of fair-minded persons, and was not just and proper under the

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[1] The state made no objection to the sentence imposed at the time of sentencing, nor on appeal, other than that the same did not comport with the demands of "Measure 11."

[2] The trial court's findings are set out verbatim in the appendix (App-5).

circumstances. The court then reversed the trial court and remanded the matter for resentencing.

REASONS FOR GRANTING THE WRIT

Traditionally trial court judges have been in the best possible position to examine evidence, evaluate witness demeanor and to decide the appropriate sentence for an offender for an offense.

The imposition of mandatory minimum sentences nationwide has wrested sentencing discretion away from courts. But, in some instances, as here, an exception to a mandatory minimum sentence is permitted by law. If a trial court exercises the discretion conferred upon it with sound and reasoned findings, the sentence imposed should be accorded due deference by the appellate courts.

Stated another way:

1) Proportionality is a fundamental constitutional right, equal in social significance to any other right. Application of the doctrine has been limited in the past by the ability of an informed, rational and analytical judiciary to fashion sentences appropriately tailored to the individual circumstances of the offense and of the defendant. That time has passed.

It is essential that this court make a clear statement that individuals in the state systems are not to be left to the mercy of mandatory minimum sentencing schemes, regardless of the merits and mitigation. Authority to make sentencing determinations has essentially been taken over by the prosecution. Prosecutors now decide who deserves mitigation, and how much, and then tailor the charges accordingly. Few defense counsel or defendants are courageous (or foolish) enough to risk a long term mandatory sentence, even on the flimsiest of evidence, versus a "cop" to some lesser offer. If the courts decline responsibility, the prosecution wields the whip hand. While such an

arrangement may be expedient, it is no less than a rape and pillage of our hallowed judicial system.

If Amendments VIII and XIV, as well as Article I, section 16 of the Oregon Constitution are to remain viable, it is essential that, whenever a trial judge has the fortitude, patience and analytical bent to undertake an in-depth probe into the proportionality of a proposed sentencing in light of the detailed underlying circumstances, two things are assured:

(a) That the trial court's determination be guided by clear and workable standards. Such undertaking should have more ground rules of procedure than the gross declaration, "shocks the moral sense of all reasonable persons";[3] and

(b) that a trial court's findings will be given full weight and credit on appeal, subject only to review for the existence of evidence to support the same, and that the conclusions will be evaluated fairly according to those findings and all implied findings consistent with the decision.

Our criminal justice system as currently conducted desperately needs help.

ARGUMENT

A. No mandatory minimum sentence if the sentence would be disproportionate

The Oregon electorate passed Ballot Measure 11 (codified as Or. Rev. Statute § 137.700), establishing 75-90 month mandatory minimum sentences, with no possibility of parole, for first time offenders convicted of particular crimes.

Article I, section 16 of the Oregon Constitution, proscribing cruel and unusual punishment, as well as the application of the Eighth and Fourteenth Amendments of the

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[3] What does that mean? Morally, religiously, socially, economically or philosophically? Is the court to apply one, or a combination of, those standards?

Constitution of the United States, have been consistently cited, and recited, in a number of Oregon cases concerning proportional sentencing. *Cannon v. Gladden,* 203 Or 629, 281 P2d 233 (1955) (specifically referring to *Weems v. United States*, 217 US 349, 367, 54 L Ed 793, 30 S Ct 544 (1910) for essentially identical language, i.e., "shock the moral sense of all reasonable men as to what is right and proper under the circumstances.") See also: State *v. VanKleeck*, 248 Or 7, 9, 432 P2d 173 (1967) ; *State v. Thornton,* 244 Or 104, 106-107 (1966); *State v. Humphrey*, 253 Or 183, 452 P2d 755 (1969).

Recently, in response to challenges to Measure 11, the Oregon Supreme Court recognized the defendant's right to raise the application of constitutional provisions concerning proportional punishment:

> "During allocution a defendant may argue that the mandatory minimum, *as applied to the particular crime*, would be unconstitutionally cruel and unusual or disproportionate" (italics in original). *State ex rel Huddleston v. Sawyer,* 324 Or 597, 612, 932 P.2d 1145, *cert. den.* __ U.S. ___, 118 S.Ct 557, 139 L.Ed 2d 399 (1997).

Clearly, "disproportionality" is highly subjective in nature. Times and circumstances, as well as attendant publicity, have no doubt gone far in shaping what "shocks the moral sense of all reasonable men (persons) as to what is right and proper." One approach, however, has consistently been applied with favor. If the offense of conviction requires a greater penalty than would be required for another offense of obviously greater culpability, then the same is "disproportioned."

B. Ballot Measure 11 is Disproportionate

The presumptive sentence for Attempted Aggravated Murder for a person with Mr. Silverman's background (no prior record) would be a presumptive sentence of 58 to 60 months. Nothing about the factual circumstances of the present offense begins to approach the culpability level of

Attempted Aggravated Murder. Neither are there attendant social consequences of the same magnitude. The adoption of Measure 11 created disproportional sentencing for the offense of Sex Abuse in the First Degree.

Further, before the adoption of Measure 11, a defendant convicted of Sex Abuse in the First Degree would be facing a presumptive sentence of 16-18 months incarceration and the prospect of probation if appropriate conditions were met. OAR 213-05-006 (App-17) . The appropriate conditions were amply demonstrated in this case and the trial court imposed an "optional probation" sentence. OAR 213-08-002(1)(a)(I) (App-18).

Guideline sentences were believed at the time of their creation to be the product of the minds of reasonable persons acting in a calm, dispassionate and analytical manner. They were the combined knowledge and experience of persons familiar with penology, psychology/psychiatry, sociology, as well as the democratic/political process. As such they would seem to provide some standard from which the existence of a disproportionate sentence would be measured. They also would appear to provide a standard to assist in determining whether or not a sentence "shocks the conscience of reasonable fair-minded persons." The projected disparity here begins at 75 months compared to 16-18 months, and increases when viewed against a prohibition of probation.

An in-depth analysis of this matter, i.e., considering a Measure 11 sentence in the abstract, against the circumstances of the offense and the conduct of the defendant, provides a similar result.

Moreover, the standard is not whether an "average citizen" might superficially approve a mandatory minimum sentence in this case. The standard is not some slipshod determination of whether or not "Joe Citizen" agrees or disagrees with a sentence he reads about in the newspaper. The standard involves a number of highly pertinent elements:

(1) that the person be "fair-minded" or "reasonable";

(2) that the person be possessed of knowledge of all of the facts and circumstances that are pertinent to the determination as to whether or not the sentence is appropriate;

(3) that the person be possessed of the knowledge, training and experience that allows him or her to appreciate and analyze the facts and circumstances of the individual case so they can act in a "fair-minded" way in determining whether or not a sentence is cruel, unusual and disproportionate.

There are instances when the court can say that society "would recognize a fact [or facts] as substantially mitigating a defendant's culpability such that the prescribed punishment is too severe even though the mitigating fact [facts] does not fall within the scope of any recognized defense."

Similarly, the fact that voters passed Measure 11 by a 2/3 vote, or any other margin, does not demonstrate more than voter approval for the facial provisions of Measure 11.[4] Neither the circumstances of this specific case, nor of any other case, were known or considered by the voters in enacting the facial terms of the Measure.

C. The trial court properly found a mandatory minimum sentence disproportionate

Here, the trial court, after hearing testimony and reviewing evidence determined that imposition of the mandatory minimum would be disproportionate to this crime

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[4] Of interest is the fact that an initiative to **repeal** the provisions of Ballot Measure 11 (Or. Rev. Stat. § 137.700) was recently submitted to the Oregon Secretary of State with some 99,692 signatures--1/3 more than necessary to qualify for Oregon's November statewide ballot. "Measure 11 Petition Loaded with Signatures" The Oregonian, April 28, 2000. This development suggests that some significant portion of the Oregon public is now questioning the wisdom of the passage of Ballot Measure 11.

and thus would be cruel and inhuman punishment because of the comparison between defendant's crime to other crimes, the facts concerning this individual (mental illness, continuous and prolonged efforts to battle that mental illness), the degree of injury to the victims, defendant's efforts at rehabilitation and the protection of the public (e.g. no treatment available in prison; fact defendant will be warehoused without treatment and then released will not protect the public.)

D. The appellate court improperly substituted its judgment for the judgment of the trial court

The Oregon Court of Appeals reviewed the sentence and improperly substituted its judgment for that of the trial judge.

The approach utilized by the Oregon Court of Appeals, to date, in this instance as well as others, appears to be to seek out portions and points within the record that will justify and support denial of any proportionality claim. But that approach is only defensible in those instances in which the trial court has refused to recognize a proportionality objection and has imposed at least the mandatory minimum mandated pursuant to Measure 11. Utilizing that approach when, as here, the trial judge has refused to apply a Measure 11 sentence, and found that the facts and circumstances do create a valid claim as to proportionality, violates constitutional guarantees to proportional sentencing.

Instead, the Court of Appeals should have crafted an analysis as to the best possible set of factual findings that the trial court could have made in support of its ruling. From that template, the court could then measure whether or not the trial court's findings were sufficient, as a matter of law, to support the judgment that the mandatory sentence was disproportionate under the appropriate constitutional provisions. The situation is essentially analogous to evaluating a motion for judgment of acquittal in the state system or to a federal circuit court reviewing a trial court's application of its discretion to a downward departure question at sentencing.

The sentencing court found that sufficient facts and circumstances existed in this case to justify probation. The trial court's determination was appropriate and supported by the record. An appellate court is not at liberty to re-find the facts as they were determined by the sentencing court if there is any evidence to support them. *Ball v.Gladden*, 250 Or 485, 443 P2d 621 (1968). And to the extent that the trial court did not make explicit findings the assumption must be made that the trial court's implied factual findings are such as would support the result if there is evidence supporting such additional facts. *State v. Weaver,* 319 Or 212, 214 n.1, 874 P2d 1322 (1994); *State v. Keeney,* 323 Or 309, 320, 918 P2d 419 (1996); *State v. Stevens,* 311 Or 119, 127, 806 P2d 92 (1991).

Thus, the appellate court should have reversed only if it could conclude that there were no facts and circumstances that could be utilized here which would justify a finding that imposition of the mandatory minimum sentence was such as would "shock the conscience of fair-minded persons" of the nature and qualifications as set out above. The appellate court could not, as a matter of law, make that determination. The record amply demonstrates that there were highly mitigating circumstances that justified the trial court in determining that when such were all fully known, analyzed and understood, it would shock the conscience of fair-minded persons to impose a 75 month prison sentence without benefit of any treatment.

E. The need for trial court deference

The advent of Measure 11 and mandatory sentencings nationwide have enormously restricted the normal ability of sentencing judge to adequately ascertain and impose a sentence that is just and proper in light of all of the circumstances.

The appellate court ruling in this case underscores the shift of power in sentencing away from the courts toward the prosecution. The district attorney chooses the charge, the charge determines the sentence. But trial court judges have

traditionally been the final arbiters of the facts, circumstances and characteristics of a defendant in an individual case. When a trial court exercises its discretion and declines to impose a mandatory minimum sentence after careful examination of the record and provides a reasoned basis for doing so, that decision should be accorded due deference by the appellate courts.

In the federal arena the power of trial courts to exercise discretion concerning sentencing has been consistently accorded great deference:

> Although the Act established a limited appellate review of sentencing decisions, it did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion.... The development of the guideline sentencing regime has not changed our view that, except to the extent specifically directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'

Solem v. Helm, 463 U.S. 277, 290 n. 16, 103 S.Ct 3001, 77 L.Ed 2d 637 (1983); quoted with approval in *Williams v. United States*, 503 U.S. 193, 112 S.Ct 1112, 117 L.Ed 2d 341 (1992) and *Koon v. United States*, 518 U.S. 81, 97.116 S.Ct 2035, 135 L.Ed 2d 392 (1996).

This court found recently in *Koon v. United States*, supra, 518 U.S. at 97 that "A district court's decision to depart from the Guidelines, by contrast, will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by the sentencing court."

Historically, deference to a trial court's exercise of discretion has been applied in all the situations in which the trial court is called upon to make a determination, ranging from motions to suppress evidence to the admissibility of confessions. A very similar approach is utilized in determining whether or not the trial court should have granted

a motion for judgment of acquittal or whether the court has correctly allowed the matter to be submitted to the jury. Generally, this principle has more often been beneficial to the prosecution. That would continue to be the case in those instances where the trial court denied an objection based upon proportionality. In a very real sense, the issue at bar is whether or not the declaration:

> "...as explained above, if a sentencing court rules that a statutorily prescribed sentence (under ORS 137.700 or any other statute) would be unconstitutionally cruel and unusual as applied in a given case, the court may refuse to impose the prescribed sentence. Nothing in ORS 137.700 interferes with the performance of that judicial function..."

State ex rel Huddleston, supra, 324 at 614 is to be given meaningful application, or whether it was only a verbalized vehicle for avoiding constitutional claims against Measure 11 facially.

Yielding to the temptation to "second guess" a sentencing court is an abrogation of true judicial responsibility and would be in shameful derogation of the historic Constitutional principles envisioned within Amendments VIII and XIV of the Constitution of the United States as well as Article I, section 16, and Article 7 (amended), section 1 of the Oregon Constitution.

This court should accept review and set the standard that the responsibility of determining the proportionality of the sentence is a valid and substantial right belonging to the sentencing court and is not one to be lightly regarded or summarily dismissed. Further, this court should render an opinion specifically setting forth the areas for consideration in adjudicating such proportionality, similar in nature to what is required in determining the imposition of the death penalty. The opinion should include an analysis of what is truly meant by whatever general standard is to be applied, i.e., whether the sentence will "shock the moral sense of all reasonable

[persons] as to what is right and proper under the circumstances," See: *State v. Isom*, 313 Or 391, 401, 837 P2d 491 (1992) and *Cannon v. Gladden*, supra, 203 Or 629, or that the sentence is so disproportionate to the circumstances of the offense as to "shock the conscience of fair-minded [persons]." *State v. Thornton*, 244 Or 104, 416 P2d 1 (1966) *State v. VanKleek*, 248 Or 7, 9, 432 P2d 173 (1967). (Or, for that matter, is there any difference?)

Whatever the standard is, it should be made clear that in applying the standard it is necessary that the matter not be viewed superficially, but rather in explicit detail. And that it be judged, not by some "pop" or "media byte" standard but according to what fully informed, qualified, reasonable/fair-minded persons might judge to be the case if they had the benefit of all the substantial detail of the facts and circumstances available and capable of being analyzed and considered.

CONCLUSION

For all the foregoing reasons, petitioner requests that a writ of certiorari issue to review the judgment of the Oregon Court of Appeals and Oregon Supreme Court.

Respectfully submitted,

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DATED this 17th day of July, 2000.

FILED: April 14, 1999

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,

Appellant,

v.

SAMUEL ARTHUR SILVERMAN,

Respondent.

(964914C2 AND 970116C3; CA A99377)

Appeal from Circuit Court, Jackson County, Loren L. Sawyer, Judge.

Argued and submitted March 17, 1999.

Timothy A. Sylwester, Assistant Attorney General, argued the cause for appellant.

Robert J. McCrea argued the cause for respondent

Before De Muniz, Presiding Judge, Haselton and Wollheim, judges.

DE MUNIZ, P.J.

Reversed and remanded for resentencing under ORS 137.700.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellant

[ ] No costs allowed [ ] costs allowed, payable by:

Appellate Judgment
Effective Date: February, 15, 2000

COURT OF APPEALS
(seal)

APPELLATE JUDGMENT

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON

Appellant/Respondent

V.

SAMUEL ARTHUR SILVERMAN

Respondent/Petitioner

ORDER DENYING REVIEW

CA A99377
SC S46729

The Court has considered the petition for review and orders that it be denied.

DATE: November 30, 1999.

/s/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

COPIES TO:

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April 14, 1999 No. 143

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,

Appellant,

v.

SAMUEL ARTHUR SILVERMAN,

Respondent.

(964914C2 and 970116C3; CAA99377)

Appeal from Circuit Court, Jackson County.

Loren L. Sawyer, Judge.

Argued and submitted March 17, 1999.

Timothy A. Sylwester, Assistant Attorney General, argued the cause for appellant. With him on the brief were Hardy Myers, Attorney General, and Michael D. Reynolds, Solicitor General.

Robert J. McCrea argued the cause for respondent. With him on the brief was Robert J. McCrea, P.C.

Before De Muniz, Presiding Judge, and Haselton and Wollheim, Judges.

DE MUNIZ, P. J.

Reversed and remanded for resentencing under ORS 137.700.

DE MUNIZ, P. J.

(526) The state appeals from a judgment imposing 10-year probationary sentences on defendant on two counts of first degree sexual abuse. ORS 163.427. The state argues that the trial court erred in ruling that the mandatory minimum prison sentences of 75 months required by ORS 137.700 (Measure 11) were unconstitutionally cruel and unusual and

in imposing probationary sentences. We agree and reverse and remand.

Defendant was charged with two counts of first degree sexual abuse and two counts of second-degree sodomy of a boy under the age of 14 and was charged with three counts of sexual abuse in the first degree of another boy under the age of 14. All of the crimes were alleged to have occurred in the later half of 1996. Pursuant to a plea agreement, defendant pleaded guilty to one count of first-degree sexual abuse of each of the victims, and the remainder of the charges were dismissed. At sentencing, the court ruled that the mandatory minimum prison sentences of 75 months for each of the first-degree sexual abuse convictions were "cruel and inhuman" and imposed probationary sentences on both convictions.

On appeal, the state contends that the trial court erred in holding that the mandatory minimum sentences required by statute for these crimes were unconstitutionally cruel and unusual as applied to the facts of this case. Defendant responds that the issue is not reviewable and, alternatively, that the lower court correctly ruled that the mandatory minimum sentences of 75 months were cruel and unusual, as applied.

We turn first to defendant's contention that the assigned error is not reviewable on appeal. Defendant argues that, in *State ex rel Huddleston v. Sawyer*, 324 Or 597, 607, 932 P2d 1145, cert den US , 118 S Ct 557, 139 L Ed 2d 399 (1997), the court concluded that a virtually identical question was not reviewable ,on direct appeal and thus was reviewable in mandamus. The state asserts that the question is reviewable under ORS 138.222(4)(c), enacted after *Huddleston* was decided, which provides that the appellate court **(527)** may review claims that a "sentencing court erred in failing to impose a minimum sentence that is prescribed by ORS 137.700[.]" Defendant responds that application of the reviewability provisions ORS 138.222(4)(c) to his case is an impermissible *ex post facto* application of the law. In *State v. DuBois*, 152 Or App 515, 924 P.2d 1264 (1998), we held that

application of ORS 138.222 (4)(c) to cases in which the crime had been committed before the enactment did not violate *ex post facto* provisions of either the state or federal constitutions. We therefore reject defendant's argument that the issue before us is unreviewable.

Article I, section 16, of the Oregon Constitution, provides: "Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense." A sentence violates this constitutional provision if it "is so disproportionate to the offense as to shock the moral sense of all reasonable persons as to what is right and proper." *State v. Isom*, 313 Or 391, 401, 837 P2d 491 (1992). The state asserts on appeal that 75-month sentences for defendant's sex crimes against children are not "so disproportionate to the offense as to shock the moral sense of all reasonable persons as to what is right and proper." Defendant argued to the trial court, and asserts on appeal, that, because several mental health professionals opined that his pedophilia is treatable and that he would not be able to receive treatment if he were imprisoned, a mandatory sentence of imprisonment would be cruel and unusual.

To review this question, we must set forth some of the underlying facts that were before the sentencing court.[1] Defendant is in his late 50s and has been a social worker for many years, primarily treating preadolescent and adolescent males. The present convictions arose from a series of events that occurred in 1996. A 13-year-old friend of defendant's son reported to a therapist that defendant had, on 20 or more occasions, fondled his genitals. In a police interview, the child reported several incidents of sodomy as well. The police then **(528)** taped a telephone call from the child to defendant in which the child told defendant he wanted the sexual contacts

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[1] Pursuant to ORS 137.077(1), we disclose some of the contents of the presentence investigation report because it "is necessary for legal analysis of the case."

to stop. Defendant agreed and expressed a concern about whether the child had told others about the sexual contacts.

Defendant was arrested on multiple charges of sodomy and sexual abuse, and, after his arrest, another friend of defendant's son came forward, stating that defendant had been making sexual advances toward the child for two years. The child reported that, on about 50 occasions, defendant had attempted to insert his hands into the child's pants. He reported that defendant had, on different occasions, unbuttoned the child's pants, asked the child to take off his swim suit, and asked the child to kiss him. The child also reported that defendant had told him that he would prefer that the child not tell anyone about what had been occurring. Defendant was charged with three more counts of first-degree sexual abuse relating to his abuse of this child, as well.

The presentence investigation revealed that numerous children had reported inappropriate sexual behaviors by defendant over many years. According to one parent, approximately 10 years before the charged incidents occurred, defendant had reached for the groin of her 10-year-old mentally retarded son during a counseling session. Another therapist reported that one of his clients, a 17-year-old male, said that defendant had asked the child to masturbate during a treatment session. Three other boys, one aged 13 and two aged 15, reported that defendant would rub and stroke their stomachs, reaching lower and lower until the children stopped him. Another mental health professional at an agency at which defendant had worked reported that there had been complaints that defendant asked children inappropriate questions about anal sex.

The record also contains information from a psychiatrist, Dr. Beebe, whom defendant had been seeing for years before the incidents that led to the current convictions, as well as information from another psychiatrist and a psychologist who evaluated defendant after the current charges were brought. Beebe described the incidents that led to the current convictions as "some inappropriate play" with defendant's

son's friends, and opined that defendant had not previously (529) been attracted to underage boys and that he could be successfully treated on an outpatient basis and by attending Sex Love Addicts Anonymous meetings.

A psychiatrist, Dr. Kjaer, who evaluated defendant at the request of his attorney, also provided a report. That report indicates that defendant had sexual experiences with adolescent males when he himself was an adolescent and that he was arrested at age 21 for inappropriate sexual contact with a male, after which he received several years of psychotherapy. Defendant continued to receive therapy at regular intervals throughout his life and was advised by a therapist not to discuss his homosexual inclinations with his wife. Defendant reported to Kjaer that, in his therapy practice, he had treated a 10-year-old boy for sexual abuse and that, when the boy reached the age of 22, they had an affair Kjaer opined that, because of defendant's grief and depression over the ending of the affair with the 22-year-old, he had allowed himself to become preoccupied with the victims whom Kjaer described as "inquisitive sexual animals." Psychological testing showed that defendant was depressed, but not psychotic. Kjaer opined in his report that defendant should continue to receive treatment from his treating psychiatrist, that he should possibly attend a short inpatient treatment program, and that "the two alleged victims should be excluded from the immediate vicinity of the defendant." In his report, KJaer further opined that it would be "unreasonable to incarcerate someone who has struggled so long privately with this disorder and now is making genuine progress towards recovery."

A psychologist, Dr. Knapp, also evaluated defendant at his attorney's request. Defendant admitted to Knapp that he had engaged in oral sex and mutual masturbation with one of the victims on five occasions. Defendant reported that he had first been arrested at age 21 after making sexual overtures to a male college student in a bathroom. He received extensive psychotherapy for many years after this incident Defendant

reported that, in 1993 or 1994, he had an affair with a 23-year-old male who had formerly been his patient when the male was 9 through 15 years of age. According to defendant, this male later developed psychological difficulties and claimed that defendant had molested him when he (530) had been a patient, which defendant maintained was not true. Defendant also told Knapp that "he felt it was possible to molest the young boy by whom he is currently being charged without harming the boy," that "not all molestation leads to serious damage," and that he "did not do anything to the young boy that the young boy did not want him to do." Knapp opined that defendant suffered from depression and pedophilia, would be amenable to outpatient sex-offender treatment, and could benefit from individual psychotherapy.

At the sentencing hearing, Kjaer testified that defendant's pedophilia stemmed from his sexual activity when he was 13 with other 13-year-old males, that pedophilia is best treated as an addiction, and that chemical treatments are available to eliminate most sexual behaviors. Knapp testified that defendant has been in therapy most of his life and has gone through a number of phases in which he has been suicidal and self-destructive. He testified that defendant was repulsed by his pedophilic urges but that he became increasingly helpless to resist them and that the current offenses were a result of his self-destructive tendencies. He opined that defendant had spent his years in therapy trying to deny, avoid and repress his problems, but that now that they had become public, he would be treatable in the community and would have a very low risk of reoffending. He acknowledged that his opinion was based on information provided to him that defendant had been charged with sexually abusing one boy on five occasions. Defendant's wife, a psychiatrist, testified at sentencing that defendant was a very good therapist, that he became depressed several years earlier and was mentally ill, but that, in the several months before the sentencing hearing, he no longer appeared to be mentally ill.

The sentencing court concluded that a long prison sentence would not be productive and that sentencing defendant "to the penitentiary for 75 months where there is no treatment is cruel and inhuman for one who has his mental disorders and that, without treatment, sending somebody to the Oregon State Penitentiary is cruel and inhuman."

We disagree with the trial court's conclusion that a 75-month prison sentence is unconstitutionally cruel and unusual given the facts of this case. We do not disagree that **(531)** it is possible that defendant would profit by further mental health treatment. However, the record shows that defendant has a history, spanning a period of over 30 years, of initiating unwanted sexual contacts. The record shows that defendant who is a mental health professional, has been in treatment with other mental health professionals during most of this time. The record shows that there were many more incidents of abuse than the two to which defendant ultimately pled guilty. The record shows that defendant has, for many years, been a therapist for sexually abused boys, yet after the current offenses, stated that "it was possible to molest the young boy by whom he is currently being charged without harming the boy," that "not all molestation leads to serious damage," and that he "did not do anything to the young boy that the young boy did not want him to do."

The question here is not whether the probationary sentence that the trial court imposed "shock[s] the moral sense of all reasonable persons as to what is right and proper," *Isom*, 313 Or at 401, but whether the 75-month prison sentence required by law for these offenses is so disproportionate to defendant's offenses that it "shock[s] the moral sense of all treasonable persons as to what is right and proper." There is nothing about defendant's circumstances or mental health that makes the sentence mandated by law any more shocking when applied to defendant than when such a sentence is imposed in other cases involving first-degree sexual abuse. In fact, given defendant's age and intelligence, his professional experience working with sexually abused

children, and the fact that he has already received years and years of mental health treatment apparently centered around his sexual problems, we find that there are fewer mitigating circumstances surrounding defendant's particular situation than are present in many cases.

In *State v. George*, 146 Or App 449, 934 P2d 474 (1997), we considered and rejected the defendant's argument that a 70-month mandatory minimum prison sentence for second-degree robbery was cruel and unusual, noting that, in *State v. Teague*, 215 Or 609, 336 P2d 338 (1959), the Supreme Court had held that a 12-year prison sentence for uttering a false check did not "shock the moral sense of all reasonable men. We concluded that if the sentence in *Teague* was "not (532) sufficiently 'shocking,' then neither is 70 months for second degree robbery, particularly when a firearm has been used." *George*, 146 Or App at 457. The same is true here: a sentence of 75 months for sexual abuse of children, particularly when the defendant is a mental health professional who treats child sex abuse victims, does not shock the conscience such that the sentence is "cruel and unusual" under Article I, section 16, of the Oregon Constitution. See also *State v. Gee*, 156 Or App 241, 244, 965 P2d 462 (1998) (90-month sentence for first-degree robbery was not unconstitutionally cruel and unusual despite the fact that the court found that defendant would respond to mental health and drug abuse treatment that would benefit him more than imprisonment); *State v. Rhodes*, 149 Or App 118, 123,941 P2d 1072 (1997) (75-month sentence for first-degree sexual abuse was not unconstitutionally cruel and unusual, where the 15-year-old defendant had no prior record but had sexually abused his half-sister more than 20 times after being disciplined by his mother for that behavior).

Defendant also asserts that a 75-month prison sentence would be "cruel and unusual" under the Eighth Amendment to the United States Constitution. However, in *Harmelin v. Michigan*, 501 US 957, 111 S Ct 2680, 115 L Ed 2d 836 (1991), the Supreme Court held that a sentence of life

imprisonment without the possibility of parole for possession of a controlled substance was not cruel and unusual. Given that holding, we do not believe that a sentence of 75 months imprisonment for the crime of first-degree sexual abuse against a child is cruel and unusual under the Eighth Amendment.

Reversed and remanded for resentencing under ORS 137.700.

THE TRIAL COURT'S FINDINGS August 27, 1997

* * * * *

THE COURT: Thank you. This case, as much as any I've had in the last years since Measure 11 was enacted, illustrates the evils of the minimum sentencing guidelines. The first 27 years of my career I spent a great deal of thoughtful time in my chambers before I ever came in to sentence anybody reading journals about particular problems, reading what some of the experts around the country had to say about what was the most appropriate kind of sentence for a particular given behavior.

I used to go to the institutions and firsthand observe what kind of things were happening to the people that I was sending to prison so that I would know what I was doing in trying to prepare myself for this job. The public and legislature has taken all that away from me, and I've been very vocal about my feelings about taking way the judge's discretion, and I think this case illustrates it as much as any I've had.

It's kind of interesting. I just finished a book on Cicero's life, and that was over 2,000 years ago. And one conclusion I came to is man has progressed technologically a great deal in the last 2,000 years, but emotionally and socially we haven't made any strides at all.

The Romans were having the same times during Cicero's times as we're having today. Cicero made statements about, when you turn over the law to the masses, you end up with bad laws, a republic form of government in that time which we have but somehow has been bent and mutilated. And hopefully someday the United States Supreme Court will bring that back to where they will allow those of us who are in this business to do our Job the way it ought to be done, and that is fashion a sentence for the particular crime and the individual.

And that sentence ought to be one which protects the public, first of all, and also gives us some assurance that the person is going to be treated or worked with so that they will not reoffend and can come back and be productivecitizens in our society. One thing I've learned is locking people up for long periods in prison does not do that. Most of them come out worse than they went in. Short sentences often are just as productive as anything. In the area of sex offenders, you know, I've handled many cases and have read a great deal about it, and one of the things they point out is that long prison sentences sometimes victimizes the victim even more because they become feeling guilty about the fact that, because they disclosed what had happened, this person goes to prison for a long period of time. And you're caught in kind of a balancing act of what is good for everybody in the process. I think it was interesting to me, the letter which was submitted in the presentence report by parents of one of the victims. And I'll just share it with those of you who haven't seen it or heard it:

> "Our journey through this difficult experience" -and they refer to the crime which Mr. Silverman is charged with -- "has been one that began with great shock and pain and has gradually evolved into a healing and compassion for those who are directly or indirectly victims of Mr. Silverman's actions, including his own family and certainly in a sense Mr. Silverman himself. "That being said, one of our primary concerns that no other children be subjected to what our son has been subjected to through this friendship Mr. Silverman. In this regard, certainly prison will keep him out of circulation for some time it is difficult to imagine that he will emerge from such an environment a better person since we come to understand that his actions were not intended to hurt Brian or our family, but grew from an illness within himself. We would opt for him receiving treatment rather than punishment, but we are in conformance. It would

> not be possible; so after a lot of soul searching, we have concluded that"-- pertaining to sentencing-- "it should left to the Court's good judgment. We wish to make it clear to Mr. Silverman and Court that we forgive him and hope that things work out for the best for him and his family. This allows us to move ahead with our own feeling [sic] and get on with your [sic] lives. We --" and they go on to say they appreciate their ability or the Court's willingness to make some input. It's interesting that a victim -- this is one most thoughtful letters of a family of a victim in my career -- that they would not want vengeance. Most often when I get letters they want vengeance. They want to pound the flesh. They think this is going to make them feel better. I think most of the victims when I talk to them afterwards it isn't a closure.

So I'm faced with Measure 11 which says I have to give 75 months, unless as the Supreme Court left me in the *Vanzant* case, left me a bit of an opening -- it's very narrow -- if I can find that the sentence is disproportionate and, therefore, cruel and inhuman to this individual; then I can fashion a sentence which is different.

You know, if we could only spend the billions of dollars that we spend on brick and mortar in prisons on treatment and programs to help the people who have problems such as Mr. Silverman, our society would be a whole lot better off. I guess that's kind of a political statement, but after 37 years sitting in this seat, that's something I have learned, and I feel very, very keenly about.

I don't say we don't need prison. We certainly do. There are some people in our society that's the only answer and is to lock them up and lock them up for life, but it isn't the answer to most of them.

I'm going to make a finding -- I'm not confident that the Supreme Court will affirm me -- but my finding is that sentencing Mr. Silverman to the penitentiary for 75 months where there is no treatment is cruel and inhuman for one who has his mental disorders and that, without treatment, sending somebody to the Oregon State Penitentiary is cruel and inhuman.

The sentence of this Court will be that he be placed on -- I'll give him optional probation -- be sentenced to 10 years probation with the first 120 days of that will be spent in the county Jail.

MR. BILLIN: Which case would that be on?

THE COURT: That's on both cases concurrent 120 days will be spent in the Jackson County Jail. He then is to continue in treatment and have no contact again with minors, and he's to complete the sex offender treatment program at the discretion of his probation officer. I can only hope that, by doing it in this fashion, that I have somehow protected society from any future acts of this kind on the part of Mr. Silverman and at the same time complied with what I think my job is and the law requires me to do.

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(RT 65-70)

Amendment VIII provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV states in pertinent part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Article 1, section 16 to the Oregon Constitution provides in pertinent part:

> "* * * Cruel and unusual punishment shall not be inflicted, but all penalties shall be proportioned to the offense-- * * *"

OAR 213-05-006 provides:

(1) If an offense is classified in grid blocks 8-G, 8-H or 8-I, the sentencing judge may impose an optional probationary sentence upon making the following specificftudings on the record:

(a) An appropriate treatment program is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism;

(b) The recommended treatment program is available and the offender can be admitted to it within a reasonable period of time; and

(c) The probationary sentence will serve community safety interests by promoting offender reformation.

(2) The sentencing judge shall not impose an optional probationary sentence if:

(a) A firearm was used in the commission of the offense; or

(b) At the time of the offense, the offender was under correctional supervision statusfor a felony conviction or a juvenile adjudication as defined in OAR 213-03-001(11).

(3) A probationary sentence imposed for an offense classified in grid blocks 8-G, 8-H and 8-I when not authorized by this rule is a departure.

ORS 213-08-002(1)(a)(I):

The offender is amenable to treatment and an appropriate treatment program is available to which the offender can be admitted within a reasonable period of time; the treatment program is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; and the probation sentence will serve community safety interests by promoting offender reformation.

137.700 Offenses requiring imposition of mandatory minimum sentences. (1) When a person is convicted of one of the of- fenses listed in subsection (2)(a) of this section and the offense was committed on or after April 1, 1995, or of one of the offenses listed in subsection (2)(b) of this section and the offense was committed on or after October 4, 1997, the court shall impose, and the person shall serve, at least the entire term of imprisonment listed in subsection (2) of this section. The person is not, during the service of the term of imprisonment, eligible for release on post-prison supervision or any form of temporary leave from custody. The person is not eligible for any reduction in; or based on, the minimum sentence for any reason whatsoever under ORS 421.121 or any other statute. The court may impose a greater sentence if otherwise permitted by law, but may not impose a lower sentence than the sentence specified in subsection (2) of this section.

(2) The offenses to which subsection (1) of this section applies and the applicable mandatory minimum sentences are:

(a)(A)	Murder, as defined in ORS 163.115	300 months

(B)	Attempt or conspiracy to commit aggravated murder, as defined in OPS 163.095	120 months
(C)	Attempt or conspiracy to commit murder, as defined in ORS163.115	90 months
(D)	Manslaughter in the first degree, as defined in ORS 163.118	120 months
(E)	Manslaughter in the second degree, as defined in ORS 163.125	75 months
(F)	Assault in the first degree, as defined in ORS163.185	90 months
(G)	Assault in the second degree, as defined in ORS 163.175	70 months
(H)	Kidnapping in the first degree, as defined in ORS 163.235	90 months
(I)	Kidnapping in the second degree,as defined in ORS 163.225	70 months
(J)	Rape in the first degree, as defined in ORS 163.375	100 months
(K)	Rape in the second degree, as defined in ORS 163.365	75 months
(L)	Sodomy in the first degree, as defined in ORS 163.405	100 months
(M)	Sodomy in the second degree, as defined inORS 163.395	75 months

(N)	Unlawful sexual penetration in the first degree, as defined in ORS 163.411	100 months
(O)	Unlawful sexual penetration in the second degree, as defined in ORS 163.408	75 months
(P)	Sexual abuse in the first degree, as defined in ORS 163.427	75 months
(Q)	Robbery in the first degree, as defined in ORS164.415	90 months
(R)	Robbery in the second degree, as defined in ORS 164.405	70 months
(b) (A)	Arson in the first degree, as defined in ORS 164.325, when the offense represented a threat of serious physical injury	90 months
(B)	Using a child in a display of sexually explcit conduct as defined in ORS 163.670	70 months
(C)	Compelling prostitution, as defined in ORS 167.017	70 months